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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian ad litem,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO STRIKE BILL OF EXCEPTIONS
and
BRIEF OF DEFENDANTS IN ERROR ON THE MERITS

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Names and Addresses of the Attorneys of Record:
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BRIEF OF DEFENDANTS IN ERROR ON MOTION TO STRIKE BILL OF EXCEPTIONS

On the Motion to strike Bill of Exceptions, Rule 4 of the Rules adopted by the United States Supreme Court December 22, 1911, reads as follows:

> "Rule 4. The judges of the District Courts in allowing Bills of Exceptions, shall give effect to the following rules:
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> "2. Only so much of the evidence shall be embraced in the Bill of Exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, **and such evidence as is embraced therein shall be set**

forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it may be set forth otherwise."

This rule was discussed by the Circuit Court of Appeals for the Second Circuit in the case of Rosenthal et al v. U. S., 271 Fed. 651, decided December 15, 1920, where the following language appears:

> "We take occasion to say once more that what we find in the present record is not a true Bill of Exceptions, as such Bills are understood in the Federal Courts, and that the practice of printing the whole of the stenographer's minutes, arguments and all, is, under the Federal practice, a waste of a client's money which is strongly disapproved. As has been said it 'is neither lawyerlike nor just to the court or to client.' We have several times before pointed out that Bills of Exceptions are not governed by the rules of the state courts under the Conformity Act. (Comp. St. No. 1537). Buessel v. United States, supra, and Rothman v. United States, 270 Fed. 31, decided at this term."

To the same effect is Linn v. United States, decided April 10, 1918, and reported in 251 Fed. 476-483.

as many other boards had done before, and that Matesco, the man in charge of the edger, raised the rolls to see what was the matter and immediately the board was hurled through the mill, striking deceased with such force as to kill him. Matesco, however, denied that he raised the rolls. At pages 176 and 177 of the record appears the following testimony of the witness Matesco.

"Q. Just tell the jury about how far that piece was through your edger when it went back.

A. Oh, that piece it was through about twenty foot, twenty-two through, was through the machine.

Q. About twenty-two feet had gone through?

A. Yes.

Q. Were the dead rolls down on it?

A. Yes."

The witness was then led on one of the long discussions which makes up the so-called Bill of Exceptions, and did not come back to the subject of what happened immediately before Simpson was hurt until on page 189, he gave the following testimony:

"Q. Tell the jury just what Mr. Simpson was doing and how he was standing.

A. I stay right there you see—yes, I stay here; I hold that lever; when the machine kick back and Mr. Simpson get hit in the left side right there, and it knock him down, this board twelve, fourteen inches, maybe got six, eight foot to go through and split in two when it got kick; the rest of it split in two."

The witness was then led over another long discussion, and again on page 195 came to the discussion of what hapenned to Simpson, and gave the following testimony:

"Q. This piece that hurt Mr. Simpson, it had gone through all but about six feet?

A. Six or eight, I can't tell.

Q. It had gone pretty well through?

A. Yes, sir.

Q. But was still a considerable portion of it, and then it kicked back?

A. Kicked back.

Q. Was there any warning?

A. No, I don't know myself how.

Q. Any chance to give any warning?

A. No, kicked back just like a bullet.

Q. Was going through when all of a sudden kicked back?

A. That is all."

On page 198 the same witness said that after Simpson was hurt he raised the rolls.

It will thus be seen that there was testimony both ways, that is to say: to the effect that Matesco did raise the rolls when the board stuck, and also to the effect that he did not raise the rolls, but that the board came back without warning and without any interference on the part of Matesco.

The evidence offered by defendants in error established conclusively that the propensity of the saw to kick back boards was due to the failure of the rolls to grip the boards with sufficient force, which was occasioned by the defective valves.

The testimony also conclusively established that because of the defective condition of the valves, the rolls did not bear down with sufficient weight on the boards to drive them through the edger, and in order to shake the valves loose and get the benefit of the full weight of the rolls, it was the habit of the operator of the edger to raise the rolls up and drop them down, in an effort to get them to bring sufficient pressure to bear on the boards to drive them through. On

page 67 of the transcript, the witness Fred Nye gave the following testimony:

"Q. What about the manner in which rolls close on a thin board, boards an inch thick?

A. Didn't have much pressure on an inch thick.

Q. How did it work in sawing boards an inch thick? What experence did you have with it here in regard to whether it would take hold of them firmly and drive them through?

A. The board stopped and we had to raise it up and whack down on it with the rolls.

Q. How often did it stop and stick that way?

A. Three or four times in half a day.

Q. How long did that continue, these rolls bucking that way?

A. Oh, well, it continued for a couple of weeks.

Q. Was that condition still existing when Simpson was hurt?

A. It was."

It will thus be seen that the case under the testimony of Nye was one of an employe trying to use a defective machine, and if there was negligence in raising the rolls, it was no more than the effort of the edgerman to make the defective machine work by "whacking" down on the boards with the rolls. This was undoubtedly a dangerous practice, but it was as well as the edgerman could do with the defective machine.

The Oregon Statutes so far as they are relative to this matter, are as follows:

Chapter XIV of Title XXXVIII, Oregon Laws, prescribes the degree of care due from certain employers, and defines the scope of the Employers' Liability Act in the following terms:

> "Section 6785. **Care Required of Owners, Contractors, etc. in Work Involving Risk or Danger.** All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged.....in the operation of any machinery ..... and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, ... and generally, all owners, contractors, sub-contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life

and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus, or device, without regard to the additional cost of suitable material or safety appliance and devices.

"Section 6788. **Who May Prosecute Action for Damages.** If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or sub-contractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action, without any limit as to the amount of damages which may be awarded; provided, that if none of the persons entitled to maintain such action reside within the state of Oregon, then the executor or administrator of such deceased person shall have a right to maintain such action for their respective benefit in the order above named."

"Section 6789. **Defense of Fellow Servant Doctrine Abrogated.** In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes,

namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery, or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act."

The Workmen's Compensation Law referred to herein is found in Title XXXVII, Oregon Laws, in which title appears the following:

"Section 6617. **Hazardous Occupations Defined.** The hazardous occupations to which this act is applicable are as follows:

(a) Factories, mills and workshops where power-driven machinery is used.

* * * *

(d) Logging, lumbering and shipbuilding operations;"

"Section 6619. **Definition of Terms Used in Act—Employer may Become Entitled as Workman to Compensation.** In the sense of this act words employed mean as here stated, to-wit:

Mill. 'Mill' means any plant, premises, room or place where machinery is used. . .."

"Employer. The term 'employer,' used in this act, shall be taken to mean any person, firm or corporation, including receiver, administrator, executor or trustee, that shall contract for and secure the right to direct and control the services of any person, and the term 'workman' shall be taken to mean any person, male or female, who shall engage to furnish his or her services subject to the direction or control of an employer."

"Section 6620. **Elective Privilege of Employer not to Accept Act—Loss of Defense of Fellow-servant—Contributory Negligence and Assumption of Risk.** Any employer engaged in any of such hazardous occupations who would otherwise be subject to this act, may on or before June 15th next following the taking effect of this act, file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund hereby created, and thereupon such employer shall be relieved from all obligations to contribute thereto, and such employer shall be en-

titled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act as if this act had not been passed, and in any action brought against such an employer on account of an injury sustained after June 30th next following the taking effect of this act, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman, that the negligence of the injured workman other than his willful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."

"Section 6639. **Rights Under Employers' Liability Act not Affected.** Nothing in this act shall be deemed to abrogate the rights of the employee under the present employers' liability law, in all cases where the employee, under this act, is given the right to bring suit against his employer for an injury."

The case is brought fairly within the terms of the statutes quoted by the evidence. On pages 64 and 65 of the record, testimony appears, which is undisputed, to the effect that the edgerman, who in this case was the witness Pete Matesco, is the man in charge of the edger, and

is the boss over the two men who assist him, one of whom was the deceased. This brings him squarely within the terms of Section 6789, Oregon Laws, herein quoted, which abolishes the defense of the negligence of a fellow servant in cases where the injury is caused or contributed to by the neglect of "any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances," or "by the incompetence or negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death." Matesco was in charge of the machine and he was entitled to direct and control Simpson's services, and Simpson was obliged to obey his orders, so they were not fellow servants within the meaning of the statute.

Plaintiff in error was an "employer" within the definition of the Workmen's Compensation Act. Simpson was a workman within the definition of that Act, and plaintiff in error had elected not to accept the benefits of the Workmen's Compensation Act, and therefore fell squarely within the provisions of that Act, in which it is expressly provided that the defense of negligence of a fellow servant is abolished.

POINTS AND AUTHORITIES.

I.

The question of proximate cause in actions for negligence is ordinarily one for the jury and unless the court can say that there was no statement of the evidence upon which fair-minded men might conclude that the negligence complained of was the proximate cause of the injury, the case cannot be taken from the jury by a peremptory instruction. The weighing of conflicting evidence and the balancing of probabilities is within the province of the jury.

Eliff v. O. R. N. Co., 53 Or. 66-75; 99 Pac. 76.

Knathla v. Ore. Short Line, 21 Or. 136-149; 27 Pac. 91.

Hartvig v. N. P. Lbr. Co., 19 Or. 522, 525; 25 Pac. 358.

Schumaker v. St. Paul, 46 Minn. 39, 43; 48 N. W. 559. 12 L. R. A. 257.

Hayes v. Mich. Gen. Ry Co. 111 U. S. 228, 242. 4 Sup. Ct. 369. 28 Law Ed. 410.

Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469.

R. R. Co. v. Stout, 17 Wallace, 657; 84 U. S. XXI 745.

Randall v. B. & O. R. R. Co., 109 U. S. 478, XXVII 1003.

II.

At common law it was no defense for an employer to show that the negligence of a co-employee contributed with the negligence of the employer to cause an injury. Differently stated, the negligence of a fellow-servant was never a defense in any case where the employer was also negligent.

Kreigh v. Westinghouse C. K. & Co., 214 U. S. 249; 53 Law Ed. 984, 988.

III.

Even if the negligence of Pete Matesco, the man in charge of the edger, did contribute to cause the accident, defendant would still be liable under the statutes quoted.

Section 6789, Oregon Laws.

Section 6620, Oregon Laws.

Camenzind v. Freeland Furn. Co. 89 Or. 158; 174 Pac. 139.

Schulte v. Pacific Paper Co., 69 Or. 334; 135 Pac. 527; 136 Pac. 5.

Estep v. Price, 115 S. E. 861.

Kuraetis v. American Can Co., 136 N. E. 69 (Mass.).

Prowse v. Owens Bottle Co., 120 S. E. 300 (W. Va.).

Salus v. Great Northern Ry., 147 N. W. 1070 (Wis.).

IV.

In actions under the Employers' Liability Act of Oregon, it is sufficient for the plaintiff to show that the accident complained of would probably not have happened but for the defective machinery mentioned in the complaint.

Morgan v. Bross, 64 Or 63, 68; 129 Pac. 118.

ARGUMENT.

THE QUESTION OF PROXIMATE CAUSE WAS FOR THE JURY.

The brief of plaintiff in error is very much like the Bill of Exceptions. Forty-five of its pages are made up of verbatim quotations of testimony in question and answer form. Plaintiff in error seems to complain of the action of trial court, however, upon the general theory that the testimony sustains the inference that the proximate cause of the injury to Simpson was the action of Pete Matesco in raising the rolls. It is certainly sufficient upon this phase of the subject to draw the court's attention to the quoted testimony from the witnesses Nye and Matesco set forth in the statement of facts herein, which clearly establishes that the jury may have found either way on the question of fact whether Matesco did or did not raise the rolls. Plaintiff in error apparently does not challenge the proposition that there was ample evidence to go to the jury on the question whether the machine was not so defective by reason of its valves being out of order as to render it inherently liable to injure workmen engaged about it by throwing boards. This proposition cannot be

seriously questioned, for the testimony of many witnesses established conclusively that the valves were in such condition that they would not permit the rolls to descend on the boards with full force when the boards were of the thickness of that being sawed when deceased was killed. Some of the witnesses were unable to explain just what was the matter with the valves, but they all agreed, including the witness for plaintiff in error, Pete Matesco, that the rolls did not come down freely and that the boards were continually kicking back out of the machine. Sometimes they would just stop and jerking the rolls up and down would so release the valves as to bring sufficient pressure to bear on the boards to force them through, and sometimes they would kick back. Likewise all of the witnesses agree that this failure to rest down upon the boards with full force produced a great liability for the boards to kick back, and that when edgers are in this condition they are prone to kick back and throw boards. That such a condition of the machine constituted a violation of Section 6785, Oregon Laws, is too plain for argument. The use of "every device, care and precaution which it is practicable to use" would certainly have included the repairing of this machine. This condition was certainly a "defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care."

Now, if it be said that the jury took the version of the accident testified to by the witness Fred Nye, and that Matesco raised the rolls, we have the case of an employer using a dangerous, defective machine which should drive the boards through directly, but which, by reason of its defective condition, causes them to balk, and the operator of the machine, in endeavoring to operate it in its defective condition, raises the rolls when the boards do balk so that the two causes combine and unite together to produce the death. All of the witnesses agree that when a board stops in the machine, there is imminent danger that it will be thrown back. To go safely it must continue to go steadily, and the stopping is a danger signal whether the rolls are lifted or not, so that if Nye, from his poor position of advantage, saw clearly what happened, and the rolls were raised before the board flew, the defective condition of the machine was part of the cause of the accident, and the accident was also contributed to by the raising of the rolls.

But this Court is not at liberty to say, nor was the Trial Court at liberty to say, whether the jury thought the rolls were raised or not. We have carefully quoted the testimony of Matesco wherein his version of the happening is given, and he says that the board was going straight through when all of a sudden, without any warning, it was kicked back. On page 177 of the record, being asked with respect to the condition existing at the time the board went back, the question "Were the dead rolls down on

employe, then they have no purpose and merely encumber the Code to no effect.

This is the way we read the legal effect of Judge Wolverton's opinion, and as we have said, we are at a loss to understand just why he struck out the allegations of negligence on the part of Matesco.

The Employers' Liability Act is clearly as broad as the common law as to cases falling within it. A case falls within it, according to Judge Harris in the Camenzind case, when the relation of master and servant exists, when machinery is being used, or when the work involves a risk or danger, and when a case falls within it, there is substituted for the common law rule of ordinary care, the higher degree of care named in the statute. Instead of ordinary care, the rule of care is "every care and precaution practicable," which, of course, includes ordinary care. This is the effect of all the Oregon decisions on the subject.

The result of these considerations is that the defendants in error were the proper parties to commence and prosecute this action upon all of the grounds named in the original complaint, and that their right of recovery for the death of deceased was not limited. If a defective machine was in use, the act was clearly a violation of the Employers' Liability Act; and if the negligence of a fellow servant concurred with the negligence of the employer in using a de-

fective machine, that fact furnished no defense for the employer; and further, even if the court had assumed the province of the jury and said that the proximate cause of the accident was the negligence of the employe in failing to use the degree of care and precaution required by the statute, it still must have followed that there was a violation of the Employers' Liability Act.

The section of the Employers' Liability Act conferring right of action upon the widow and surviving children confers that right for any violation of the terms of the Employers' Liability Act. The pre-existing death statute of the State of Oregon, which is in effect a re-enactment of Lord Campbell's Act, has no applicability to the case, nor does it express the policy of the State of Oregon with respect to the beneficiaries bringing this action. It is idle to say that the policy of the State of Oregon is to limit recovery for death, when the policy of the State of Oregon is, as it must be, expressed in its laws. That was the policy of the State before the Employers' Liability Act and the Workmen's Compensation Act were enacted. It is not the policy of the State under those Acts. The policy of the State under the Employers' Liability Act is expressed in that Act, and is to allow what a jury may assess the damages to be, according to the measure of damages applicable under that Act. The policy of the State under the Compensation Act is to award an income to the surviving family, and

it is only fair to say that that income, in the expectancy of life of the defendants in error, would have very greatly exceeded in value the award of the jury in this case. To create the necessary income some $18,000.00 would have been required to be set aside. So counsel are grossly in error when they say that it is the policy of the State of Oregon to leave the widow and children of a deceased workman, killed as Simpson was killed, dependent upon charity, or to make it possible for employers, by rejection of the Workmen's Compensation Act of the State, followed by hair-splitting quibblings over remote questions of causation, to leave the public charities of the State to carry the burden incurred by the gross negligence of mill operators. The policy of the State is exactly the reverse, and we respectfully submit that the only weakness in the administration of the policy of the State in this cause lies in the fact that the award of the jury was comparatively small.

Respectfully submitted,

LORD & MOULTON,

Attorneys for Defendants in Error.